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November 22, 2002

RECEIVED

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

NOV 22 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Ex Parte* Presentation in CC Docket No. 01-92

Dear Ms. Dortch:

On November 1, 2002, Transtel Communications, Inc. ("Transtel") filed reply comments in the above-referenced docket containing a number of mischaracterizations and inaccuracies. U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific") provides exchange access services in connection with 8YY calls delivered to Transtel's affiliate, Tel-America of Salt Lake City, Inc. ("Tel-America"), for which TelePacific is entitled to compensation in the form of access charges. Although Transtel implies that TelePacific is improperly assessing access charges, it is Transtel that is violating the FCC's rules when it refuses to pay for access services provided by TelePacific.

To correct the record in this proceeding, TelePacific files this *ex parte* presentation along with a copy of the informal complaint TelePacific filed against Tel-America on November 15, 2002, for failure to pay TelePacific access charges for interexchange calls delivered to Tel-America. As described in the complaint, TelePacific is a competitive local exchange carrier ("CLEC") that is entitled to compensation for the services it provides Tel-America. Specifically, TelePacific provides the local switching functions, performs the database dips required to identify the interexchange carrier ("IXC") to which the traffic is routed, and provides the transport functions necessary to connect customers to the incumbent local exchange carrier ("ILEC") tandem before the traffic is delivered to Tel-America. Contrary to Transtel's representations, the ILEC does not perform the NS800 database query on the 8YY number, nor does TelePacific route all the traffic through its Los Angeles switch. Finally, not all the traffic in question is cellular. Eighteen percent of the traffic delivered to Tel-America in October 2002 was 1+ or casual dialing; 69% of the traffic originated from cellular end-users; and some of TelePacific's end-users have pre-subscribed to Tel-America for long distance services.

As explained in greater detail in TelePacific's complaint, IXCs, such as Transtel and Tel-America, should not be permitted to benefit from access services provided by local exchange carriers ("LECs"), whether they are ILECs or CLECs, without paying for such services. The Commission has made clear that CLECs may seek compensation for the same elements of switched access service as ILECs. Furthermore, the Commission has acknowledged that LECs are entitled to receive access charges regardless of whether the traffic is wireline or

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November 15, 2002

BY HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 - 12th Street, S.W., Room TW-A325
Washington, DC 20554

Attention: Enforcement Bureau, Market Disputes Resolution Division

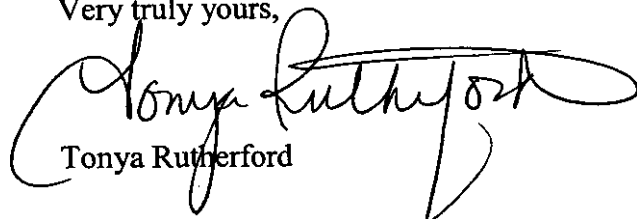
Re: Informal Complaint Against Tel-America of Salt Lake City, Inc.

Dear Ms. Dortch

Enclosed on behalf of U.S. TelePacific Corp., and pursuant to Section 208 of the Communications Act of 1934, as amended, 47 U.S.C. §208 and Section 1.711 of the Commission's rules, 47 C.F.R. §1.711, are an original and four copies of an Informal Complaint against Tel-America of Salt Lake City, Inc.

In the event there are any questions concerning this matter, please let me know.

Very truly yours,



Tonya Rutherford

Enclosures

1 Tel-America apparently is affiliated with TransTel Communications, Inc. The relationship between Tel-America and TransTel is unclear to the undersigned. A letter dated April 16, 2002, from Blackburn & Stoll, counsel for TransTel Communications, represented that Tel-America is a wholly-owned subsidiary of TransTel. Independent research suggests that TransTel and Tel-America are affiliates of Telephone Electronics Corp. Regardless of the actual relationship, Blackburn & Stoll has never denied representation of Tel-America or knowledge of this matter. Any discussion in this complaint or attachments regarding communications between Tel-America and TelePacific is intended to reference communications between TransTel and TelePacific, and for the purpose of this pleading, "Tel-America" shall hereafter refer to either or both of Tel-America or TransTel.

In support of its Informal Complaint, TelePacific states the following:

(a) Name, address and telephone number of complainant:

U.S. TelePacific Corp.
515 South Flower Street
47th Floor
Los Angeles, CA 90071-2201
(213) 213-3690

(b) Name of carrier against which complaint is made:

Tel-America of Salt Lake City, Inc.

(c) A complete statement of the facts demonstrating what the carrier did ~~or~~ did not do in contravention of the Act:

Since 1999, TelePacific has provided Tel-America access services associated with 8YY calls transported by TelePacific to Pacific Bell's or Verizon's tandems, and more recently to Sprint of Nevada (collectively "ILEC tandems"), and ultimately delivered to Tel-America. Since 1999, Tel-America has accumulated over \$458,441.20 in access charges owed to TelePacific. Tel-America, however, has never paid TelePacific for the services it has provided Tel-America, in spite of TelePacific's numerous efforts to resolve this matter?

² TelePacific has made several attempts to settle this matter with Tel-America; however, Tel-America has never offered to pay TelePacific even a partial settlement of these claims. TelePacific sent Tel-America letters on May 6, 2002 ("Attachment A"), and on October 8, 2002, ("Attachment A") attempting to resolve this matter. In its letter of October 23, 2002, Tel-America indicated a desire to settle the matter; however, when TelePacific contacted Tel-America to inquire whether any settlement proposal would be made by Tel-America, the IXC did not have a proposal. Since that call, TelePacific has not heard any proposal from Tel-America.

Background

Certain cellular carriers, universities, hotels, hospitals, and other business customers, that are unaffiliated with TelePacific and have selected TelePacific to carry their originating 8YY traffic, have established T-I-based facilities called "SuperTrunks" to connect their customers to one of TelePacific's local switches? If a customer dials a toll-free number, the TelePacific switch recognizes the 8YY number, and the SS7 data links are used to query the 800 database as to how to route the call. If the call is identified in the 800 databases as an interexchange carrier ("IXC") call for Tel-America, Tel-America's carrier identification code is returned and appended to the message. TelePacific then transports the call from its wire center to the ILEC tandem, and ultimately the call is delivered to Tel-America.

Under this arrangement, TelePacific provides exchange access functions for which it is entitled to be compensated in the form of access charges. The FCC has stated that the basic services comprising interstate switched access entail a connection between the caller and the local switch, a connection between the local exchange carrier ("LEC") switch and the serving wire center, and an entrance facility which connects the serving wire center and the long distance company's point of presence! In this case, TelePacific provides the local switching functions, performs the database dips required to identify the IXC to which the traffic should be routed, and provides the transport functions necessary to connect customers to the ILEC tandem before the traffic ultimately is delivered to Tel-America. Because TelePacific provides these necessary exchange access functions, it is lawfully entitled to recover its costs through access charges regardless of whether the customer is a cellular customer or any other type of customer.

³ TelePacific has five switches in California and one switch in Nevada.

⁴ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923,9949 ¶55 (2001) ("CLEC Access Charge Order").*

TelePacific Is Entitled To Recover Access Charges From Tel-America.

To recover the costs of providing interstate access services, LECs charge IXCs and end-users for access services in accordance with the Commission's Part 69 access charge rules.⁵ As noted above, the majority of the traffic at issue is 8YY traffic that originates from unaffiliated cellular carriers, universities, hotels, and hospitals, to name a few. There is no question that such traffic is interexchange and subject to the access regime.

Without duplicating the ILEC function in the calling path (tandem switching in this case), TelePacific performs functions equivalent to those that the ILEC would provide if TelePacific were not present in the calling path. The Commission has noted that competitive LECs ("CLECs"), such as TelePacific, may seek compensation for the same elements of switched access service as incumbent LECs, including common line charges, local switching and transport.⁶ While TelePacific has not imposed common line charges on Tel-America, TelePacific seeks to recover its local switching, database dip, and transport costs through its access charges. Tel-America is obligated to remit such charges for originating access.

Tel-America, however, **seeks** to avoid payment of access charges in this case by claiming that cellular traffic delivered to an IXC is not subject to access charges. As an initial matter, TelePacific notes that the traffic in question is not exclusively cellular traffic. TelePacific also provides local exchange and exchange access service to universities, hotels, hospitals, and other business customers that use TelePacific's services to place 8YY or other long distance calls. For example, approximately 18% of the traffic delivered to Tel-America in

⁵ 41 C.F.R. Part 69.

⁶ *CLEC Access Charge Order*, at ¶55; see *supra* discussion at n.4 and accompanying text.

October 2002 was 1+ or casual dialing, while an estimated 69% of the traffic originated from cellular end-users. TelePacific also has end-user customers that have pre-subscribed to Tel-America for long distance services. This interexchange traffic also is routed to Tel-America, an IXC, and therefore is subject to access charges.

Furthermore, in spite of Tel-America's claims to the contrary, the Commission has acknowledged that LECs may recover access charges from IXCs when interstate interexchange traffic passes from commercial mobile radio service ("CMRS") customers *to* IXCs via LEC networks.⁷ This is precisely the arrangement that TelePacific has with certain unaffiliated cellular carriers, and is analogous to the situation in which the incumbent LEC delivers traffic from a CMRS provider to ~~an~~ MC. Because TelePacific has replaced the incumbent LEC for a portion of the originating access function, TelePacific, therefore, is entitled *to* recover its costs ~~from~~ Tel-America for the originating access function it performs.

The Commission also has recognized in the past that CMRS carriers are entitled to recover access charges ~~from~~ IXCs.⁸ Under the FCC's tentative conclusion in the *LEC-CMRS Interconnection* proceeding, when two carriers, such as a LEC and a CMRS carrier, jointly provide access service for interexchange calls, both would be entitled to recover their costs

⁷ Indeed, in addressing whether CMRS providers can receive access charges from IXCs, the Commission tentatively concluded that "CMRS providers should be entitled to recover access charges from IXCs, *as the LECs do when interstate interexchange traffic passes from CMRS customers to IXCs (or vice versa) via LEC networks.*" *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5075 ¶16 (1996) (emphasis added). See also *TSR Wireless v. US West Communications, Inc.*, Memorandum Opinion and Order, 15 FCC Rcd 11166, 11184 ¶31 (2000) (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16016-17 ¶1043 (1996) for the proposition that LEC-CMRS traffic carried by an interexchange carrier falls within the access charge regime).

⁸ *LEC-CMRS Interconnection Order* at ¶116.

through access charges.’ The Commission noted that many CMRS carriers will not generate sufficient traffic volumes to warrant a direct connection to every IXC’s point of presence.”

Consequently, as the Commission acknowledged, many CMRS providers will have to depend on LECs for interconnection of their interexchange traffic.” The cellular carriers with which TelePacific jointly provisions access service,¹² as well as the universities, hotels, hospitals, and other business customers for which TelePacific carries 8YY traffic, have decided that, rather than connect directly to the ILEC’s tandem or to various IXCs’ points of presence, they will rely on TelePacific to transport their interexchange traffic to the ILEC tandem, and the ILEC, in turn, will transport the traffic to the IXC. Indeed, in some cases, TelePacific bypasses the ILEC tandem altogether and directly connects its customers to an IXC’s point of presence. Regardless of whether TelePacific connects its 8YY customers to the IXC’s point of presence directly or indirectly through the ILEC tandem, it is entitled to receive originating access charges.

⁹ In this case, TelePacific collects such charges from the IXC and shares the revenues with the CMRS provider. TelePacific notes that the Commission has before it a proceeding in which US LEC Corporation seeks a ruling reaffirming that LECs are entitled to recover access charges from IXCs for the provision of access service on interexchange calls originating from, or terminating on, the networks of CMRS providers. *In the Matter of Petition of USLEC Corp. for Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic*, CC Docket No. 01-92, Petition for Declaratory Ruling of US LEC Corp (filed Sept. 26, 2002). The Commission should not wait for a decision in that proceeding to resolve this matter. In the event that this informal matter is not resolved, TelePacific intends to file a formal complaint pursuant to Section 208 of the Act.

¹⁰ *LEC-CMRS Interconnection Order at ¶15.*

¹¹ *Id.*

¹² The 8YY traffic for which TelePacific jointly provides access services is interexchange traffic. In some cases, the 8YY traffic originates with an unaffiliated cellular customer. As the Commission has acknowledged, when a CMRS caller places a long distance call, the CMRS caller typically transports the call to the LEC, and the LEC performs a database dip and then connects the call to the IXC. As such, TelePacific and the CMRS providers are jointly providing access service for which Tel-America is obligated to pay. The appropriate compensation mechanism for such service is access charges.

TelePacific's Presumptively Reasonable Rates May Be Imposed By Tariff.

Because TelePacific's rates are presumptively reasonable, it is entitled to payment from Tel-America. The Commission established in the *CLEC Access Charge Order* a benchmark level at which CLEC rates for originating and terminating access service, including toll-free 8YY traffic,¹³ will be presumed just and reasonable and therefore may be tariffed.¹⁴ The Commission concluded that an IXC's refusal to serve the end-users of a CLEC that is charging rates at or below the benchmark, when the IXC is also serving the customers of other LECs in the same geographic area, constitutes a violation of the duty of all common carriers to provide service upon reasonable request under Section 201(a) of the Act." TelePacific's rates are presumptively just and reasonable because they fall within the Commission's safe harbor. Tel-America has not challenged the reasonableness of the tariffed rates charged. Because TelePacific's rates are presumptively reasonable, and Tel-America provides interexchange service to customers of Verizon and Pacific Bell in the Los Angeles area and Sprint in Las Vegas, Tel-America is obligated under the Commission's rules to provide service to TelePacific's customers and to remit access charges billed by TelePacific for the local switching, database dips, and transport functions that TelePacific provides.¹⁶

¹³ *CLEC Access Charge Order* at ¶56.

¹⁴ *Id.* at ¶40

¹⁵ *Id.* at ¶116.

¹⁶ TelePacific notes that its rates prior to June 2001, when the *CLEC Access Charge Order* became effective, also are presumed lawful. Indeed, the Commission expressly stated that "[it] considers [non-dominant carriers'] tariff filings to be presumptively lawful." *Tariff Filing Requirements for Nondominant Common Carriers*, Order, 10 FCC Rcd 13653, 13654 73 n.13 (1995). In addition, in a recent declaratory ruling challenging access rates charged by certain CLECs prior to the effective date of the *CLEC Access Charge Order*, the Commission concluded that "where CLECs sought to originate or terminate traffic with an IXC at access rates that were presumptively lawful at that time, we find that the IXCs were required to exchange traffic with the CLEC." *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, Declaratory Ruling, 16 FCC Rcd 19158, 19163 ¶16 (2001). The Commission further concluded that

Tel-America's Failure To Pay TelePacific Constitutes Self-Help
And Violates Section 201 Of The Act.

Section 201(a) of the Act imposes a duty on common carriers, such as Tel-America, to accept a reasonable request for service.” The Commission has concluded that a reasonable request is “a request to carry traffic that is tarified at a presumptively reasonable rate.”” Therefore, if a CLEC charges a presumptively reasonable rate, as TelePacific has in this case, the IXC “cannot refuse to exchange originating or terminating traffic with the CLEC.”¹⁹ Because Tel-America has refused to pay TelePacific for access service since 1999, Tel-America is in violation of Section 201(a) of the Act.

Furthermore, as the Commission repeatedly has held in the past, carriers are “not entitled to the self-help measure of withholding payment for tarified services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier’s applicable tarified charges and regulations.”²⁰ Thus, as the Commission concluded in *MGC v. AT&T*, Tel-America may not engage in impermissible self-

“until there has been an affirmative finding that a particular tarified rate was unreasonable, the presumption of lawfulness accorded to non-dominant carrier tariffs applied.” *Id.* TelePacific’s rates during the period prior to June 2001 are similarly presumed lawful, and in fact have been steadily declining over the past couple of years. There has been no finding that TelePacific’s tarified rates are unreasonable. Consequently, TelePacific’s rates prior to June 2001 are presumed lawful; thus, Tel-America is obligated to pay the tarified rates to TelePacific for the services rendered.

¹⁷ 47 U.S.C. § 201(a).

¹⁸ *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, Declaratory Ruling, 16 FCC Rcd 19158, 19162-63 ¶¶14-16 (2001).

¹⁹ *Id.* at ¶15.

²⁰ *Brooten v. AT&T*, Memorandum Opinion and Order, 12 FCC Rcd 13343, 13351 n.53 (Com. Car. Bur. 1997).

help by refusing to pay for the originating access service that it has received from TelePacific since 1999.²¹ Such behavior constitutes a direct violation of Section 201(b) of the Act.

(d) Specific relief of satisfaction sought:

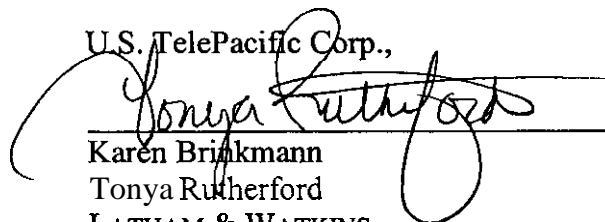
TelePacific **seeks** an order declaring that Tel-America's failure to pay TelePacific access charges for the services rendered violates Sections 201(a) and (b) of the Act.

TelePacific also **seeks** damages in the amount of \$339,854.90 for unpaid access charges for the period from October 2000 through September 2002 plus interest.²²

Finally, TelePacific respectfully **requests** that the Commission order all other remedies that it deems appropriate.

Respectfully submitted,

U.S. TelePacific Corp.,



Karen Brickmann

Tonya Rutherford

LATHAM & WATKINS

555 Eleventh Street, N.W.

Suite 1000

Washington, D.C. 20004-1304

(202) 637-2200

Counsel for U.S. TelePacific Corp.

Erich E. Everbach
General Counsel
U.S. TelePacific Corp.
515 South Flower Street
47th Floor
Los Angeles, CA 90071-2201
(213) 213-3690

Date: November 15, 2002

²¹ *MGC Communications, Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 11647, 11659 ¶27 (1999).

²² Attachment C contains a summary of the charges due to TelePacific for the relevant period.

Attachment A

ORIGINAL

Marlene H. Dortch
November 22, 2002
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cellular. Based on strong Commission precedent, the Commission should grant US LEC's Petition.

In accordance with Commission rules, this letter and the attachments are being filed in duplicate. If you have **any** questions, please contact Tonya Rutherford at (202) 637-1023.

Sincerely,

A handwritten signature in black ink, appearing to be 'KAB', followed by a horizontal line.

Karen Brinkmann
Counsel for U.S. TelePacific Corp.